

United States Courts
Southern District of Texas
FILED

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JAN 21 2004

Michael N. Milby, Clerk

**In Re ENRON CORPORATION
SECURITIES LITIGATION**

THIS DOCUMENT RELATES TO:

All Cases

MARK NEWBY, ET AL.,

Plaintiffs,

V.

ENRON CORPORATION, ET AL.,

Defendants.

CIVIL ACTION NO: H-01-3624
(Consolidated)

**REPLY OF CERTAIN OFFICER DEFENDANTS IN SUPPORT OF
THEIR MOTION TO COMPEL DEUTSCHE BANK ENTITIES**

Defendants Cindy Olson, Lawrence G. Whalley, Mark A. Frevert, Mark E. Koenig, and Steven J. Kean (“Officer Defendants”) file this reply in support of their motion to compel Deutsche Bank Entities, and respectfully show the Court as follows:

I. Introduction

In August, 2003, the Officer Defendants served Deutsche Bank AG, Deutsche Bank Securities, Inc. (Successor of Deutsche Banc Alex Brown, Inc.), DM Alex Brown LLC and Deutsche Bank Trust Company Americas (“Deutsche Bank Entities”) with Requests for Production of Documents. The Officer Defendants’ requests seek data relating to the volume and types of transactions in Enron stock that were handled by the Deutsche Bank Entities. The Officer Defendants’ experts will use this data to analyze alleged damages and to determine how Enron stock

1059

traded in the market. The requests do not seek documents relating to the allegations of wrongdoing that Plaintiffs have asserted against the Deutsche Bank Entities. The Officer Defendants served similar requests on several other financial institutions that handled significant volumes of Enron stock transactions. The Deutsche Bank Entities have not provided any written responses or objections to these requests.¹

In their response to the Officer Defendants' motion to compel, the Deutsche Bank Entities claim that they need not respond to any discovery requests because the discovery stay under the Private Securities Litigation Reform Act ("PSLRA") is still in effect as to them. This position is contradicted by the rulings of this Court, the applicable law, and common sense.

II. Discussion

This Court lifted the PSLRA stay on April 24, 2003. *See* April 24, 2003, Order ("the discovery stay under the PSLRA is hereby LIFTED."). Nonetheless, the Deutsche Bank Entities assert that, because the Deutsche Bank Entities were not parties to the *Newby* litigation when the stay was lifted, they are not bound by this Court's order. *See* Opposition to Motion to Compel, p. 2. The Deutsche Bank Entities further assert that a June 27, 2003, Order issued by this Court "clarified" the April 24, 2003, Order by reaffirming that the lifting of the stay applied only to parties currently named in the *Newby* litigation. *See* Opposition, p. 2.

¹The Deutsche Bank Entities assert that counsel for the Officer Defendants did not comply with local rules by failing to contact counsel for the Deutsche Bank Entities "in person or by telephone" and failing to make a "good faith effort to resolve[] the matters in dispute" before involving the Court. *See* Opposition to Motion to Compel, p. 3. As the Deutsche Bank Entities acknowledge, the parties exchanged correspondence on this issue and the Deutsche Bank Entities' September 30, 2003, letter made it clear that they were not willing to produce *any* documents, or even serve appropriate written responses. This was not a matter of negotiating some narrowed requests that would overcome some limited objection. *See* September 30, 2003 letter, attached as Exhibit A.

The Deutsche Bank Entities' arguments are without merit.² First, the language of the April 24, 2003, Order could not be clearer: "the discovery stay under the PSLRA is hereby LIFTED." The Court made no exceptions to this ruling and exempted no entities from the result.

Second, the Deutsche Bank Entities' interpretation of the June 27, 2003, Order as excluding all non-parties from discovery is incorrect. The Court stated in the June 27, 2003, Order, "While a number of parties have contended that newly filed motions to dismiss Newby Lead Plaintiff's First Amended Consolidated Complaint have imposed another discovery stay under the PSLRA, this Court disagrees." See June 27, 2003, Order. Contrary to the Deutsche Bank Entities' assertion, the language in this Court's June 27, 2003, Order does not distinguish between parties and non-parties in terms of ongoing discovery and specifically states that "this Court will not add additional delay . . ." to this suit. See June 27, 2003, Order.

Third, the Deutsche Bank Entities' position defies common sense. It is illogical for the Deutsche Bank Entities to assert that they are somehow shielded from discovery when others who are not even parties to this case can be required to produce documents. Indeed, even if this Court

²The Deutsche Bank Entities' reliance on case law for the assertion that the PSLRA stay has been renewed as to them is misplaced. The Deutsche Bank Entities cite *In re CFS-Related Securities Fraud Litigation*, 213 F.R.D. 435 (N.D. Okla. 2003), and *In re Lernout & Hauspie Securities Litigation*, 214 F. Supp. 2d 100 (D. Mass. 2002). Neither the reasoning nor the holding of those cases supports a stay in this case. Both courts recognized that the purpose of the stay is to prevent "fishing expeditions" and attempts to force "innocent parties to settle frivolous class actions" before the complaint has been tested by a motion to dismiss. *Lernout*, 214 F. Supp.2d at 100 (quoting H.R. Conf. Rep. No. 104-369 at 37, 735); *CFS*, 213 F.R.D. at 446. In this case, the complaint has already survived a motion to dismiss and, regardless of whether the Deutsche Bank Entities' motion to dismiss is granted or denied, the Officer Defendants will still need the market data sought by the discovery requests at issue. *Lernout*, 214 F. Supp. 2d at 100 (permitting discovery against officer defendants even though other defendants' motions to dismiss were still pending); *CFS*, 213 F.R.D. at 446 (permitting discovery to proceed against defendants even though motions to dismiss counter and cross claims were still pending).

granted the Deutsche Bank Entities' motion to dismiss, they would still be required to produce (in response to a subpoena) the same documents currently sought by the Officer Defendants in their requests for production. To wait for this outcome to manifest, if at all, is simply to "add additional delays" to this suit. *See* June 27, 2003, Order.

Finally, both parties and non-parties alike have recognized that this Court lifted the discovery stay on April 24, 2003. Numerous non-parties have been subpoenaed and have responded with documents (*e.g.*, Bank of New York).³ Likewise, parties other than the Deutsche Bank Entities with currently pending motions to dismiss the Amended Complaint, have responded to requests for production (*e.g.*, Credit Suisse First Boston). Only the Deutsche Bank Entities claim that they are somehow still immune from discovery.

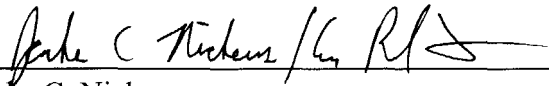
The Officer Defendants, therefore, respectfully request that this Court order the Deutsche Bank Entities to produce documents responsive to the Officer Defendants' Requests for Production and hold that the PSLRA discovery stay has not been "renewed" as to any entity or party.

III. Prayer

FOR THESE REASONS, the Officer Defendants request that this Court order the Deutsche Bank Entities to produce documents responsive to the Officer Defendants' Requests for Production, and enter an Order that the PSLRA stay has been lifted as to all parties and non-parties.

³One entity for which this statement is not true is BT Investment Partners, Inc. ("BT"), an LJM2 partner on which Defendant Ken Harrison has served a valid subpoena. BT claims that the PSLRA discovery stay applies to them, *a non-party*, because BT is an affiliate of the Deutsche Bank Entities. *See* Objection of BT Investment Partners, Inc. to Subpoena Duces Tecum, attached as Exhibit B. There is no precedent to support BT's position that non-parties are protected from discovery in a securities litigation case after the PSLRA stay has been lifted.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Jacks C. Nickens / Lm R/S", is written over a horizontal line.

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CERTIFICATE OF SERVICE

The undersigned certifies that on January 21, 2004, he served a true and correct copy of the foregoing document on all counsel of record by posting said document in .pdf format to the <http://www.esl3624.com> website.



Paul D. Flack

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THOMAS C. GRAHAM
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September 30, 2003

VIA FACSIMILE AND U.S. MAIL

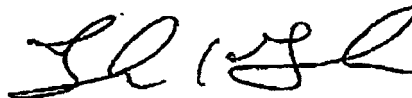
Jessica L. Wilson, Esq.
Attorneys at Law
600 Travis Street, Suite 7500
Houston, Texas 77002

Re: In re Enron Corp. Securities, Derivatives & "ERISA" Litigation, MDL 1446

Dear Ms. Wilson:

We received your September 24, 2003 letter concerning document requests the "Officer Defendants" in Newby and Tittle purport to have served on the "Deutsche Bank Entities." As you know, in her December 20, 2002 decision, Judge Harmon dismissed in its entirety the Newby complaint as to Deutsche Bank. Although plaintiffs have re-pled their claims, Deutsche Bank's motion to dismiss the First Amended Consolidated Complaint is still pending. Accordingly, the Newby complaint (or, for that matter, any Enron related complaint) has yet to be upheld against Deutsche Bank and the discovery stay imposed by the Private Securities Litigation Reform Act is still in effect with respect to Deutsche Bank. No Deutsche Bank entities are named in the Tittle action. Based on the foregoing, written responses and objections to the document requests¹ are not required and Deutsche Bank will not be producing responsive documents.

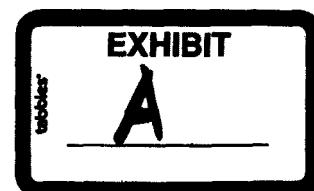
Very truly yours,



Thomas C. Graham

¹ Deutsche Bank expressly reserves the right to assert any, and all, objections, if appropriate, in the future.

HOUSTON • NEW YORK



In re ENRON CORPORATION SECURITIES
LITIGATION

MARK NEWBY, et al., Individually and On
Behalf of All Others Similarly Situated,

VS.

Defendants.

Plaintiffs,

vs.

Defendants.

U.S. District Court for the
Southern District of Texas
Case Number: H-01-3624
(Consolidated)

CLASS ACTION

Investment Partners, Inc., through its undersigned counsel, hereby objects to the Subpoena *Duces Tecum*, dated November 21, 2003 (the “Subpoena”), directed towards BT Investment Partners, Inc. (“BTIP”), on the following grounds:



1. The Subpoena violates the discovery stay in effect in the above-captioned litigation pursuant to the Private Securities Litigation Reform Act (the “PSLRA”). BTIP is a wholly owned, indirect subsidiary of Deutsche Bank AG (“DBAG”) and an affiliate of Deutsche Bank Trust Company Americas (“DBTC”) and Deutsche Bank Securities Inc. (“DBSI”). DBAG, DBTC and DBSI are named defendants in the above-captioned litigation with motions to dismiss pending. Accordingly, the PSLRA discovery stay is in effect as to each of them. See Opposition of Deutsche Bank Entities to Certain Officer Defendants’ Motion to Compel Deutsche Bank Entities to Respond to Request for Production, dated December 8, 2003. Given that requiring BTIP to respond to the Subpoena would require the production of documents from DBAG, DBTC and DBSI, it is an end-run of the PSLRA discovery stay.

2. There has been no showing that the discovery sought by the subpoena is required to preserve evidence or that the sought discovery is necessary to prevent undue prejudice. Thus, an exception to the PSLRA discovery stay is not warranted.

3. The Subpoena is grossly excessive, overly broad and unduly burdensome, vague and ambiguous and seeks documents not relevant to these proceedings nor reasonably calculated to lead to the discovery of admissible evidence.

4. To the extent the Subpoena seeks documents subject to the attorney-client privilege, the work product doctrine, or any other applicable privilege or protection against disclosure.

5. To the extent the Subpoena seeks to impose obligations beyond those imposed by the Federal Rules of Civil Procedure or the local rules for the Southern District of New York.

6. BTIP reserves the right to raise additional, specific objections to the definitions, instructions and individual requests within the Subpoena to the extent the PSLRA stay is ever lifted as against it.

Dated: New York, New York
December 16, 2003

WHITE & CASE LLP

By: /s/
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Attorneys for BT Investment Partners, Inc.

CERTIFICATE OF SERVICE

The undersigned attorney hereby certifies that, on December 16, 2003, the foregoing
Objection of BT Investment Partners, Inc. to Subpoena *Duces Tecum* was served on the counsel
listed below via facsimile and regular mail:

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_____/s/_____
Joseph B. Schmit